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No. 94-717

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH P. NAPOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to collateral relief under 28 U.S.C. 2255 based on his claim that the jury instructions at his racketeering trial did not comply with *Reves* v. *Ernst & Young*, 113 S. Ct. 1163 (1993).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A18-A29) is reported at 32 F.3d 31. The opinion of the district court (Pet. App. A1-A17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1994. The petition for a writ of certiorari was filed on October 20, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a four-month jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of racketeering and conspiring

to engage in racketeering, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) and (d). Petitioner was sentenced to 46 months' imprisonment, fined $75,000, and ordered to forfeit $30,000. The court of appeals affirmed, *United States* v. *Eisen*, 974 F.2d 246 (2d Cir. 1992), and this Court denied certiorari, 113 S. Ct. 1841 (1993) (No. 92-969). Petitioner then collaterally attacked his conviction under 28 U.S.C. 2255. The district court denied relief. Pet. App. A1-A17. The court of appeals affirmed. *Id.* at A18-A29.

1. Morris J. Eisen, P.C., was a Manhattan law firm that specialized in bringing personal injury suits on behalf of plaintiffs. The Eisen firm earned millions of dollars in contingency fees by bringing false personal injury suits, paying friendly witnesses to testify favorably, paying hostile witnesses not to testify at all, and creating false photographs, documents, and physical evidence of accidents for use before and during trial. Petitioner was of counsel to the firm and was its main trial attorney. He helped direct the affairs of the Eisen firm by trying cases and obtaining favorable settlements through the use of bribes and falsified evidence. Pet. App. A2-A3, A20-A21, A27.

a. The government's theory at trial was that the Eisen firm was a RICO "enterprise," and that petitioner had "conduct[ed] or participate[d], directly or indirectly, in the conduct of [the] enterprise's affairs," within the meaning of 18 U.S.C. 1962(c). The district court instructed the jury that to establish petitioner's guilt under Section 1962(c), the government was required to prove, *inter alia*, that he

> knowingly and intentionally conducted or participated in the conduct of the affairs of the

> enterprise through the pattern of racketeering activity. The word "through" simply means "by means of, in consequence of, or by reason of."
>
> Simply put, the prosecution must prove that there is a meaningful connection between the pattern of racketeering activity and the affairs of the enterprise, that is, that [petitioner] knew of the existence of the enterprise and intended that its affairs be furthered by [petitioner's] engaging in a pattern of racketeering activity.

Pet. App. A7-A8, A21. The court also instructed the jury (*id.* at A8, A22):

> The prosecution is not required to prove that [petitioner] participated in the management or control of the enterprise. The prosecution is, however, required to prove that [petitioner's] acts were related to the enterprise and that those acts were known to and were intended to further the affairs of the enterprise and did in fact further the affairs of the enterprise.
>
> The prosecution need not prove, as the statute indicates, that [petitioner] directly participated in the conduct of the affairs of the enterprise. It must prove, however, that [petitioner] either directly or indirectly conducted or participated in the conduct of the enterprise's affairs through the pattern of racketeering activity.

Finally, the court instructed the jury that the same definitions applied to the RICO conspiracy charge brought under 18 U.S.C. 1962(d). Pet. App. A8-A9. Petitioner did not challenge those instructions at trial. *Id.* at A22.

b. The court of appeals affirmed. *United States* v. *Eisen*, 974 F.2d 246 (2d Cir. 1992). In his opening brief, petitioner did not challenge the above-quoted jury instructions on Section 1962(c). In his reply brief, however, petitioner noted that the issue of whether a defendant must participate in the operation or management of a RICO enterprise to violate 18 U.S.C. 1962(c) was pending before this Court in *Reves* v. *Ernst & Young*, 113 S. Ct. 1163 (1993), and he contended that "the Government's proof was * * * insufficient to meet * * * the standard that [the] Supreme Court might well adopt" in *Reves*. Gov't C.A. App. 18. The court of appeals did not specifically advert to that claim in its decision.[1]

c. Petitioner filed a petition for a writ of certiorari in this Court. He claimed, *inter alia*, that his RICO conviction was improper because he was merely of counsel to the Eisen firm, and "did not participate in the conduct of [the] enterprise's affairs within the meaning of [the] RICO statute." In particular, he contended, Section 1962(c) requires proof that the defendant "exercised control over the management or operation of the enterprise." Petitioner noted that the issue was pending before this Court in *Reves*. See U.S. Br. in Opp. at 11-12, No. 92-969.[2]

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[1] The court of appeals dismissed several unspecified arguments without comment, "find[ing] them to be without merit." *United States* v. *Eisen*, 974 F.2d at 269.

[2] In our brief in opposition, we mistakenly stated that petitioner had failed to raise a *Reves* claim in the court of appeals. See U.S. Br. in Opp. at 12, No. 92-969. Petitioner responded by noting that he had raised that claim in his reply brief before the court of appeals, as well as in a petition for rehearing before that court. See Pet. Reply Br. at 2, No. 92-969. By letter dated February 10, 1993, we advised the Court that petitioner's assertion was correct, but noted the possibility that the Second Circuit had "failed to

On March 3, 1993, this Court decided *Reves*. The Court held that "to conduct or participate, directly or indirectly, in the conduct of [a RICO] enterprise's affairs" within the meaning of Section 1962(c), a defendant must "participate in the operation or management of the enterprise itself." 113 S. Ct. at 1166.[3] On April 19, 1993, this Court denied certiorari in petitioner's case. 113 S. Ct. 1841 (No. 92-969).

2. a. Petitioner collaterally attacked his conviction under 28 U.S.C. 2255, claiming that the jury instructions used at his trial were incorrect under *Reves*. The district court reached the merits of petitioner's claim, but it concluded that the jury instructions were "consistent with *Reves*' operation or management test" because "the balance of the instruction[s]" focused on "the extent to which [petitioner's] acts of participation in fact further[ed] the affairs of the enterprise itself and [were] known and intended by [petitioner] to advance those affairs. This is all that *Reves* requires." Pet. App. A10. In light of the jury instructions as a whole, the court concluded, "there is no possibility that the jury

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address that claim * * * because of the view that petitioner waived the claim by failing to raise it in his opening brief." Nonetheless, in light of the court of appeals' failure to discuss the issue of waiver, we noted that "the Court may wish to hold the petition pending decision of *Reves*." See Letter from William C. Bryson, Acting Solicitor General, to the Honorable William K. Suter, Clerk, United States Supreme Court (Feb. 10, 1993).

[3] In *Reves*, the Court affirmed a grant of summary judgment awarded to an accounting firm, Ernst & Young, which was sued civilly under RICO. See 18 U.S.C. 1964. Ernst & Young provided accounting services to a RICO enterprise, but it did not participate in the operation or management of the enterprise itself. Thus, the Court held, the firm was not liable under 18 U.S.C. 1962(c). See 113 S. Ct. at 1173-1174.

convicted [petitioner] for conduct that is not proscribed by section 1962(c) as illuminated by *Reves*." *Id.* at A11. Accordingly, the district court denied relief.

b. The court of appeals affirmed. Pet. App. A18-A29. The court "assume[d] for purposes of this appeal that the [jury] instructions were erroneous." *Id.* at A25. The court also noted that neither petitioner nor any of his co-defendants had challenged the RICO instructions at trial, and that only petitioner and one of his co-defendants had raised the issue before exhausting their direct appeals. *Ibid.* The court held, however, that, "[e]ven * * * assum[ing] that [petitioner] * * * preserved [his] challenge[]," petitioner was not entitled to collateral relief under Section 2255, because the instructional error claimed by petitioner was not the type of "fundamental defect giving rise to a complete miscarriage of justice" that would support a collateral attack. *Id.* at A25-A26 (citing *United States* v. *Addonizio*, 442 U.S. 178 (1979)).

The court first noted that, on direct appeal, review of matters not properly raised at trial is strictly limited by the plain-error standard. Pet. App. A26-A27 (citing *United States* v. *Olano*, 113 S. Ct. 1770, 1779 (1993)). Under that standard, the court noted, even "a jury instruction which omits an element of the offense" is not plain error where "the element was proven by overwhelming evidence." *Id.* at A26 (citing *United States* v. *Tillem*, 906 F.2d 814, 824-825 (2d Cir. 1990)). That was true here, the court found, because there was "overwhelming evidence" that petitioner "played some part in directing the affairs" of the Eisen firm as required by *Reves*. *Id.* at A27.[4] Because the claimed defect in the

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[4] The court summarized the government's case against petitioner on this issue (Pet. App. A27, citations omitted):

jury instructions would not meet the plain-error standard, which is "less stringent" than the standard that applies under Section 2255, the court concluded that there was no "fundamental defect" in the trial that would warrant relief. *Id.* at A26-A27.

ARGUMENT

Petitioner contends that the court of appeals erred in denying him collateral relief under 28 U.S.C. 2255 for a claim of error in the jury instructions at his RICO trial. He suggests that he was entitled to collateral relief because his claim became available only under this Court's subsequent decision in *Reves* v. *Ernst & Young*, 113 S. Ct. 1163 (1993). That contention lacks merit.[5]

> Although [petitioner] * * * contend[s] that [he was] no more than [an] outside, "Of Counsel," attorney[] to the Eisen firm, the evidence demonstrated that [he was] not merely providing peripheral advice, but had participated in the core activities that constituted the affairs of the Eisen firm, namely, trying cases and obtaining settlements. Moreover, [he] discharged [his] responsibility through a pattern of illegal acts. In the *Ferri*, *Mulnic*, *Robbins* and *Rehberger* cases [litigated by petitioner for the Eisen firm], the jury found that [petitioner] had procured false testimony through bribery, fabricated testimony for witnesses at trial and suborned perjury. * * *
>
> As [an] attorney[] for the Eisen law firm with primary responsibility for the actual litigation of lawsuits, [petitioner] * * * exercised a significant degree of direction over the affairs of the enterprise. [His] role plainly involved participating in the control or management of the firm, within the definition of *Reves*.

[5] It is not clear whether petitioner challenges his conviction for RICO conspiracy, 18 U.S.C. 1962(d), as well as his conviction for substantive RICO violations, 18 U.S.C. 1962(c). To the extent that he does challenge the former conviction, his claim is without merit. A defendant can be guilty of conspiring to violate RICO even if he

1. Petitioner argues (Pet. 10-13) that the court of appeals erred in holding that no relief was warranted under Section 2255 because, given the overwhelming evidence of petitioner's guilt, the claimed error in the RICO jury instructions did not affect the trial's fundamental fairness. He argues that his claim is properly viewed as a due process challenge, because, in his view, his reliance on circuit precedents later rejected by this Court in *Reves* deprived him of an opportunity to present a full defense.

As this Court recognized in *United States* v. *Addonizio*, 442 U.S. 178, 184 (1979), "[i]t has * * * long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." See *United States* v. *Frady*, 456 U.S. 152, 165 (1982) ("we have long and consistently affirmed that a collateral challenge may not do service for an appeal"). Where a claim of error has been properly preserved and fully litigated on direct review, collateral relief under 28 U.S.C. 2255 is available only to remedy a jurisdictional error, a constitutional error that causes harm to the defendant, or an error of federal law that amounts to "a fundamental defect which inherently results in a complete miscarriage of justice." *United States* v. *Addonizio*, 442 U.S. at 185; see *Davis* v. *United States*, 417 U.S. 333, 346 (1974); *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979); *Hill* v. *United States*, 368 U.S. 424, 428 (1962).

When a petitioner under Section 2255 does not raise or fully litigate a claim of error at trial or on direct appeal, collateral review is even more circumscribed. Before a

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is not legally capable of violating RICO's substantive provisions. See, *e.g.*, *United States* v. *Quintanilla*, 2 F.3d 1469, 1484-1485 (7th Cir. 1993).

reviewing court will reach the merits of a procedurally defaulted claim, the petitioner must demonstrate both "cause" for his failure to raise the issue and "actual prejudice" resulting from the error he alleges. See *Sawyer* v. *Whitley*, 112 S. Ct. 2514, 2518 (1992); *Murray* v. *Carrier*, 477 U.S. 478, 489-491 (1986); *Smith* v. *Murray*, 477 U.S. 527, 533 (1986); *Engle* v. *Isaac*, 456 U.S. 107, 129 (1982). That stringent standard furthers the important societal interest in the finality of criminal judgments. See *United States* v. *Frady*, 456 U.S. at 166.

In this case, it is conceded that petitioner failed to raise his claim of instructional error in the trial court, as is required by Fed. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection"). Accordingly, petitioner would not have been able to obtain relief on direct appeal based on his *Reves* claim without meeting the rigorous plain-error standard of Fed. R. Crim. P. 52(b). Plain error under Rule 52(b) requires not only a showing of an obvious error that affects the defendant's substantial rights, but also a showing that, in the absence of a remedy, a "miscarriage of justice" would occur. *United States* v. *Olano*, 113 S. Ct. 1770, 1777-1779 (1993). It is doubtful that petitioner even preserved his *Reves* claim on direct appeal by raising it for the first time in his reply brief and a rehearing petition.[6] But, even assuming that he had

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[6] The Second Circuit, like other courts of appeals, see, *e.g.*, *Bendix Autolite Corp.* v. *Midwesco Enters., Inc.*, 486 U.S. 888, 895 (1988) (noting similar Sixth Circuit rule), generally will not entertain claims raised for the first time in a reply brief, even when those claims were properly preserved by objection at trial.

raised his *Reves* claim on direct appeal, petitioner could not have established that the alleged instructional error at his trial was plain error.

As the court of appeals noted, "[u]nder the plain error rule[,] * * * a jury instruction which omits an element of the offense does not warrant reversal if the element was proven by overwhelming evidence." Pet. App. A26. The Second Circuit has applied that principle to claims that a jury instruction in a RICO trial did not comply with the requirements established in *Reves*. See *United States* v. *Thai*, 29 F.3d 785, 816 (2d Cir.), cert. denied, 115 S. Ct. 456, 496 (1994); *United States* v. *Wong*, No. 92-1602 (2d Cir. Nov. 8, 1994), slip op. 8036-8043. In those cases, the jury was not instructed that, to violate 18 U.S.C. 1962(c), the defendant must be shown to have operated or managed the affairs of the enterprise. Nevertheless, the court of appeals concluded that because the evidence left no doubt that the defendants had engaged in that form of operation or management, the instructional error had not resulted in a "miscarriage of justice." The same is true here. There was overwhelming evidence that petitioner operated or managed the affairs of the RICO enterprise in this case. See note 4, *supra*. Therefore, petitioner's claim of error under *Reves* did not amount to a miscarriage of justice.

In light of the fact that petitioner could not have met the plain-error standard, the court of appeals correctly held (Pet. App. A27-A28) that petitioner was not entitled to collateral relief under Section 2255. Section 2255

See, *e.g.*, *Knipe* v. *Skinner*, 999 F.2d 708, 711 (2d Cir. 1993); see also *United States* v. *Perkins*, 994 F.2d 1184, 1191 (6th Cir.), cert. denied, 114 S. Ct. 279 (1993); *United States* v. *Bentson*, 947 F.2d 1353, 1356 (9th Cir. 1991), cert. denied, 112 S. Ct. 2310 (1992); *United States* v. *Mejia*, 844 F.2d 209, 214 n.1 (5th Cir. 1988).

requires a petitioner to surmount the "higher hurdle," *United States* v. *Frady*, 456 U.S. at 166, of showing "a fundamental defect which inherently results in a complete miscarriage of justice." *United States* v. *Addonizio*, 442 U.S. at 185; *Hill* v. *United States*, 368 U.S. at 428. Given that petitioner "participated in the core activities that constituted the affairs of the [RICO enterprise]," Pet. App. A27, the absence of a specific instruction that directed the jury's attention to the "operation or management" test did not result in a fundamentally unfair trial. Thus, to provide relief for petitioner in this Section 2255 proceeding would produce an anomalous result: An error that could not have been corrected on direct appeal would nevertheless form the basis for collateral relief. The court of appeals properly avoided that asymmetrical consequence.

2. Petitioner contends (Pet. 5-9) that his failure to object at trial to the RICO jury instructions should be excused, because his trial occurred before this Court decided *Reves*. Petitioner cannot excuse his trial default, however, merely by alleging that the law of the Second Circuit would have made a timely objection futile. As this Court has noted, "the futility of presenting an objection to the [trial court] cannot alone constitute cause for a failure to object at trial," because "[e]ven a * * * court that has previously rejected a[n] * * * argument may decide, upon reflection, that the contention is valid." *Engle* v. *Isaac*, 456 U.S. at 130; *United States* v. *Frady*, 456 U.S. at 168 n.16. The only exception to that principle that this Court has recognized is for claims that are so novel that the basic building blocks that would have allowed counsel to construct the claim were unavailable at the time of the procedural default. See *Reed* v. *Ross*, 468 U.S. 1 (1984); *Engle* v. *Isaac*, 456 U.S. at 133. That is not true of the

claim that this Court found meritorious in *Reves*. Not only was this Court's analysis in *Reves* based principally on the statutory language of RICO (which was available to petitioner at all times), but in addition two courts of appeals had found similar claims meritorious before petitioner's case went to the jury in February 1991. See *Yellow Bus Lines, Inc.* v. *Drivers Local Union 639*, 913 F.2d 948, 954 (D.C. Cir. 1990) (en banc), cert. denied, 501 U.S. 1222 (1991); *Bennett* v. *Berg*, 710 F.2d 1361, 1364 (8th Cir.) (en banc), cert. denied, 464 U.S. 1008 (1983).[7] Under this Court's cases, the division of authority that already existed when petitioner was tried "means that the argument was not so novel that counsel could not assert it." *Roman* v. *Abrams*, 822 F.2d 214, 223 (2d Cir. 1987), cert. denied, 489 U.S. 1052 (1989).

There is no merit to petitioner's claim that the Second Circuit's construction of RICO, which was later rejected in *Reves*, deprived him of an "opportunity to be heard," in violation of his due process rights. The claim that petitioner now seeks to raise *was* available to him at the time of trial, even if not "every astute counsel would have relied" on it. *Engle* v. *Isaac*, 456 U.S. at 133. As this Court noted in *Engle*, "[e]very trial presents a myriad of possible claims," and "[c]ounsel might have overlooked or chosen to omit" any given claim whether or not he perceived it as available under current law. *Id.* at 133-134. The Constitution "guarantees criminal defendants only a fair trial and a competent attorney. It

[7] Moreover, as this Court noted in *Engle* v. *Isaac*, 456 U.S. at 133 & n.41, "[e]ven those decisions rejecting the defendant's claim, of course, show that the issue had been perceived by other defendants and that it was a live one in the courts at the time," and thus that it cannot be said that petitioner "lacked the tools to construct [his] * * * claim."

does not insure that defense counsel will recognize and raise every conceivable * * * claim." *Id.* at 134.[8]

Petitioner suggests (Pet. 5-8) that the decision below conflicts with numerous cases in which this Court has reviewed defaulted claims in the interests of justice. Those cases all came to this Court on direct review. They are therefore part of the evolution of this Court's plain-error jurisprudence, which now includes specific requirements for review of defaulted claims. See *United States* v. *Olano*, *supra*. Those cases have no bearing in the present context, because this Court has repeatedly held that collateral relief requires a more stringent showing. *United States* v. *Frady*, 456 U.S. at 166; *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

Petitioner also contends (Pet. 8-9) that the decision below conflicts with *United States* v. *Quintanilla*, 2 F.3d 1469 (1993), in which the Seventh Circuit reviewed the merits of a *Reves* claim notwithstanding the defendant's failure to object at trial. *Quintanilla*, however, involved a direct appeal from a criminal conviction, not a collateral attack. Thus, *Quintanilla* does not conflict with the decision below. Moreover, other decisions of the Seventh Circuit make clear that it would follow the same approach as the court below. See, *e.g.*, *United States* v.

[8] In any event, the jury instructions that were given at petitioner's trial made clear that not every individual associated with a RICO enterprise is guilty of racketeering; rather, the jury had to find that petitioner's acts "were known to and were intended to further the affairs of the enterprise and did in fact further the affairs of the enterprise." Pet. App. A9. Petitioner therefore had every incentive to disassociate himself from the "operation" of the enterprise and to put on a vigorous defense that he lacked the ability to control or manage it. In those circumstances, the claimed *Reves* error did not prejudice his ability to mount a defense.

Ross, No. 92-3774 (7th Cir. Nov. 4, 1994) (per curiam), slip op. 3 ("an erroneous [jury] instruction with respect to an element of the offense is not always cause for reversal" of a conviction under 28 U.S.C. 2255; instead, court must "assess the effect of the error on the jury").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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